Supreme Court, U.S.
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No. 00-1035

IN THE

Supreme Court of the United States

LEONARD MINZER, *et al.*,

Petitioners,

v.

GERALD C. KEEGAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether a petition seeking to challenge a unanimous decision of the Court of Appeals for the Second Circuit should be granted where there is no split among the Circuits, no conflict with this Court's decisions and no important issue of federal law at stake.

2. Whether a unanimous panel of the Second Circuit erred in affirming the dismissal of petitioners' second amended (and "corrected") complaint alleging proxy violations where:

   a. there was no causal link between approval of the challenged merger transaction and the loss alleged by petitioners; and

   b. the alleged omissions in the proxy statement were immaterial under this Court's probability/ magnitude test for the materiality of merger discussions.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, respondents make the following corporate disclosure statements:

- Respondent Astoria Financial Corporation is the parent company of and owns 100% of the stock of respondent Astoria Federal Savings and Loan Association.

- Respondent The Greater New York Savings Bank was merged with and into respondent Astoria Federal Savings and Loan Association on or about September 30, 1997.

- Respondents are not aware of any other parent or publicly held companies that own 10% or more of the stock of any corporate respondent.

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ADDITIONAL STATUTORY PROVISIONS INVOLVED

The Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (1995) (codified as amended at 15 U.S.C. § 78u-4), provides in relevant part:

§ 78u-4. Private securities litigation.

* * *

(b) Requirements for securities fraud actions

(1) Misleading statements and omissions

In any private action arising under this chapter in which the plaintiff alleges that the defendant —

(A) made an untrue statement of a material fact; or

(B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;

The complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and

belief, the complaint shall state with particularity all facts on which that belief is formed.

* * *

(3) Motion to dismiss; stay of discovery.

(A) Dismissal for failure to meet pleading requirements

In any private action arising under this chapter, the court shall, on the motion of any defendant, dismiss the complaint if the requirements of paragraphs (1) and (2) are not met.

* * *

(4) Loss Causation.

In any private action arising under this chapter, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages.

COUNTER-STATEMENT OF THE CASE

1. Introduction

This is a classic strike suit — precisely the type of case that the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 (the "Reform Act"), was designed to purge from the federal court system.

After filing breach of fiduciary duty claims in state court immediately following announcement of the merger transaction at issue, petitioners subsequently filed a federal court action challenging certain disclosures in the joint proxy statement issued by respondent banks. The main federal allegations concerned statements relating to a rejected merger proposal made by another bank. Based on erroneous assumptions of a purported state law duty to conduct an "auction" and sell the bank to the highest bidder, petitioners alleged that the approval of the merger transaction caused them to lose the speculative possibility of a more favorable transaction with the rejected bank.

Petitioners are wrong. There was no state law duty to auction the bank nor to negotiate with another bidder. Indeed, the proxy statement fully disclosed the fact that there was no auction and that higher offers from third parties would potentially be foreclosed by the terms of the merger agreement. Moreover, petitioners alleged that the respondent board members would never have agreed to any merger whatsoever with the unwanted suitor. Petitioners now refuse to recognize what a unanimous panel of the Second Circuit made plain in an opinion authored by its Chief Judge — that there is no causal relationship between the shareholders' overwhelming approval of the merger and the purely

speculative "loss" alleged by petitioners. The validity of this proposition became more evident when in response to petitioners' petition for panel rehearing and suggestion for rehearing en banc, which raised the same arguments presented here, not a single judge of the entire Second Circuit requested that a vote be taken thereon.

2. Procedural History

On March 31, 1997, The Greater New York Savings Bank ("The Greater") and Astoria Financial Corporation ("Astoria") jointly announced that their respective boards of directors had agreed to a merger at a significant premium to The Greater's historic trading value. (*See* 48a, ¶ 3[1]) Within seventy-two hours, respondents filed suit in New York State court alleging that The Greater's board breached its fiduciary duty to The Greater's shareholders by failing to conduct an auction. (5a-6a) This complaint was ultimately dismissed without prejudice by stipulation of the parties. (6a)

On July 18, 1997, petitioners filed their initial complaint in the United States District Court for the Eastern District of New York alleging proxy violations under Section 14(a) of the Securities Exchange Act of 1934 and Rule 14a-9 promulgated thereunder. Those allegations related to information disclosed in a joint proxy statement/prospectus (the "Proxy") about a less favorable merger proposal received by The Greater from North Fork Bancorporation, Inc. ("North Fork"), which The Greater had previously rejected. Petitioners also reiterated their state law "failure to conduct an auction" fiduciary duty claims. (*See* 7a; 28a)

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1. Parenthetical references to a number followed by a lower case "a" are to the page(s) of the appendix to the Petition For A Writ Of Certiorari (hereinafter, "Petition").

Respondents moved to dismiss the complaint for, among other reasons, petitioners' failure to comply with the Reform Act's pleading requirements. (*See* 7a) The District Court reserved decision and granted petitioners' application to lift the Reform Act's mandatory stay of discovery. (*See* 7a)

Despite their allegations of improper disclosure, petitioners made no attempt to enjoin the shareholder vote on the merger. (*See* 28a) On or about August 1, 1997, more than 97% of The Greater's shareholders that voted — including North Fork itself — approved the merger. (*See* 48a-49a; *Minzer v. Keegan*, No. 97-CV-4077 (CPS), 1997 U.S. Dist. LEXIS 16445, at *11 & n.4 (E.D.N.Y. Sept. 22, 1997)) Although: (a) they had already filed a complaint challenging the proxy disclosures, and (b) the Proxy advised them that they had the right to dissent and seek an appraisal, petitioners chose not to exercise these state law rights.

a. Petitioners Obtain Discovery From The Key Players And Amend Their Complaint Based Thereon

Petitioners subsequently amended their complaint based on the substantial document and deposition discovery they conducted (7a-8a), and included selected quotations from the deposition transcripts in their amended complaint. (*E.g.*, 49a-50a, ¶ 4(b)) The gravamen of petitioners' amended complaint was that, in stating that North Fork declined to raise its bid, the Proxy did not disclose that North Fork was not given the same opportunity as Astoria to conduct due diligence. (*See* 60a-61a, ¶¶ 38-39) Erroneously alleging that The Greater had a state law duty to auction itself to the highest bidder (74a, ¶ 75), the complaint further speculated that had North Fork done due diligence, it *might* have made a revised,

higher offer. But even so, petitioners asserted, The Greater would have rejected any revised offer because it did not want to merge with North Fork under any circumstances. (69a, ¶ 65; 73a, ¶ 72) There was no allegation — nor could there be — that North Fork actually made a revised offer higher than the one already disclosed in the Proxy.

b. Petitioners' Motion To Enjoin The Merger Is Denied And The Transaction Is Consummated

On or about September 2, 1997, petitioners moved for a preliminary injunction to enjoin the merger. After an evidentiary hearing, which included testimony from the Chairman and CEO of North Fork and other key witnesses, then-Chief Judge Charles P. Sifton denied the motion because, among other things, petitioners had failed to show a likelihood of success on the merits. *See Minzer v. Keegan*, No. 97-CV-4077 (CPS), 1997 U.S. Dist. LEXIS 16445 (E.D.N.Y. Sept. 22, 1997). The merger transaction was consummated on September 30, 1997 and all The Greater's shareholders, including petitioners, realized a substantial premium for their shares. (48a-49a, ¶ 3)

c. The District Court Dismisses The First Amended And Second Amended (And Then "Corrected") Complaints

In November, 1997, respondents moved to dismiss the first amended complaint. On June 1, 1998, having rejected as frivolous petitioners' arguments that the Reform Act was inapplicable to their complaint, the Court granted respondents' motion to dismiss based on, among other things, petitioners' failure to comply with the pleading requirements of the Reform

Act and their failure to state a claim for a proxy violation. *See Minzer v. Keegan*, No. 97-CV-4077 (CPS) (E.D.N.Y. June 1, 1998).

On July 1, 1998, petitioners again amended their complaint, this time purportedly to comply with the pleading requirements of the Reform Act. (48a, ¶2) The vast majority of the allegations in this "new" pleading, however, were identical to those dismissed in the first amended complaint. On July 21, 1998, respondents moved to strike and/or dismiss petitioners' second amended complaint. (29a) On August 5, 1998, petitioners effectively amended their complaint for a third time when they submitted a "corrected" second amended complaint to the District Court. (47a)

On January 25, 1999, the District Court dismissed the second amended (and "corrected") complaint because petitioners once again failed to, *inter alia*, state a claim for a proxy violation. (*See* 18a-44a) As it had previously in dismissing the first amended complaint, the District Court properly held that under the facts alleged by petitioners, the purported omissions concerning North Fork's merger overtures were not material under the probability/magnitude test this Court established in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988). (*See* 36a-38a)

The District Court also dismissed petitioners' claim regarding an allegedly misleading fairness opinion issued by Sandler O'Neill & Partners, L.P., The Greater's financial advisor ("Sandler O'Neill").[2] Having dismissed petitioners' federal claims, the District Court in its sound discretion declined to exercise supplemental jurisdiction over petitioners' state law "duty to auction" claims. (42a-43a)

2. Contrary to the suggestion in the Petition at page 21, the complaint did *not* assert a claim for relief against Sandler O'Neill, which has never been a defendant in the action.

d. The Second Circuit Affirms The Dismissal And Rehearing Is Denied

The District Court's decision was affirmed by a unanimous panel of the Second Circuit. (*See* 1a-17a) Writing for the panel, Chief Judge Winter found that even if the alleged omissions concerning North Fork's merger overtures were material, a point it did not decide, under the peculiar facts alleged by petitioners there was no causal link between the alleged omissions and the alleged injury. (2a; 10a-13a) The Second Circuit also found that petitioners failed to allege any provable facts that would render Sandler O'Neill's fairness opinion false or misleading.[3] (13a-15a) A petition for panel rehearing and suggestion for rehearing en banc was denied. (45a-46a)

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3. Although the Second Circuit did not resolve the issue, it is clear that the second amended (and "corrected") complaint still does not comply with the pleading requirements of the Reform Act. *See* 15 U.S.C. § 78u-4(b)(1); *Desaigoudar v. Meyercord*, 223 F.3d 1020, 1022-23 (9th Cir. 2000) (affirming dismissal of Rule 14a-9 complaint for failure to comply with (b)(1) pleading requirements).

Petitioners' second amended (and "corrected") complaint — their fourth pleading in this action — is a jumble of confusing and contradictory allegations that impermissibly saddled defendants, then the District Court, then the Second Circuit and now this Court with the burden of attempting to decipher it. It is precisely the type of pleading that the Reform Act was designed to eliminate from the federal docket — a scattershot of allegations made in the hope that something will stick, so that undeserving shareholders can extract a settlement payment from an innocent company seeking to avoid the high costs of litigation. *See* S. REP. No. 104-98, at 10 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 689 ("Our economy does not benefit when strike suit artists wreak havoc on our Nation's boardrooms and deter capital formation.").

REASONS FOR DENYING THE WRIT

Petitioners have wasted enough judicial resources pressing their meritless disclosure allegations. In the substantial proceedings below, petitioners received every consideration and opportunity to properly plead a valid claim under the federal securities laws — they simply could not do so.

None of the compelling reasons that warrant this Court to grant a writ of certiorari are present in this case. There is no split among the Circuits, no conflict with the relevant decisions of this Court and no significant legal issues crying out for resolution by this Court.

THE SECOND CIRCUIT'S DECISION IS FULLY CONSISTENT WITH THIS COURT'S DECISIONS IN *MILLS*, *VIRGINIA BANKSHARES* AND *BASIC*

The Second Circuit held that petitioners failed to state a claim for a proxy violation because the alleged omissions, if corrected, would not cause shareholders to be any less likely to approve the objected-to transaction. Petitioners claim that holding contradicts this Court's reasoning in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), and also argue that it was improper for the Second Circuit, rather than a jury, to make that determination. (Petition at pp. 10-15, 17-19.) Both these arguments are without merit. Moreover, this Court's decision in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), further demonstrates that the alleged omissions are not actionable.

a. The Second Circuit's Decision Follows This Court's Reasoning In *Mills*

The *Mills* causation rule was designed to relieve a class of shareholders from the difficult burden of proving whether the materially misleading provisions of a proxy had a decisive effect on shareholder voting where, as was the case in *Mills*, the approval of the challenged transaction was the injury about which the shareholders complained. *See Mills*, 396 U.S. at 384-85. Thus, this Court held that, where there is a material omission, causation between the proxy violation and the challenged merger is presumed so long as the proxy was an "essential link" to the harm (*i.e.*, the merger itself). *Id.* at 385.

Here, unlike in *Mills*, the injury complained of is not the approval of the challenged merger itself. Rather, petitioners complain of the "loss" of the speculative possibility of a more beneficial merger opportunity with North Fork, which they erroneously allege The Greater's board had a duty to negotiate and ultimately accept. There was, however, no duty to auction The Greater, negotiate with North Fork nor to provide North Fork with due diligence. State law leaves these decisions to the sound discretion of the board of directors, not the shareholders.[4] (*See* 12a-13a).

Petitioners alleged that The Greater's board would not have agreed to a merger with North Fork, even if North Fork had

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4. In the sense that the "loss" would have occurred regardless of the misleading proxy because the objecting shareholders were powerless to stop it, this case is similar to *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), where controlling shareholders had enough votes to approve the objected-to transaction without seeking the minority shareholders' votes. (*See* 11a)

increased its bid after a due diligence review. (69a-70a, ¶ 65) Given this allegation, even assuming petitioners' highly speculative scenario had been disclosed in the Proxy, those disclosures could never have resulted in the benefit petitioners complained they were deprived of (*i.e.*, a merger with North Fork at a higher price). Accordingly, as the Second Circuit correctly recognized, there was no causation as a matter of law. *See Burke v. Jacoby*, 981 F.2d 1372, 1379-80 (2d Cir. 1992) (affirming grant of summary judgment because there was no causation where shareholder would not have changed her vote or dissented had she known omitted information, whether or not it was material); *see generally Grace v. Rosenstock*, 228 F.3d 40, 47 (2d Cir. 2000) ("[B]oth loss causation and transaction causation must be proven in the context of a private action under § 14(a) of the 1934 Act and SEC Rule 14a-9 promulgated thereunder."); *AUSA Life Insurance Co. v. Ernst and Young*, 206 F.3d 202, 216 (2d Cir. 2000).[5] Moreover, as the Second Circuit found, petitioners remain free to seek to litigate all of their breach of

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5. Many other Circuits follow this causation requirement. *See The Ambassador Hotel Company, Ltd. v. Wei-Chuan Investment*, 189 F.3d 1017, 1027 (9th Cir. 1999) ("The causation requirement can be broken down into two necessary elements: actual cause, or transaction causation; and proximate cause, or loss causation."); *Robbins v. Koger Properties, Inc.*, 116 F.3d 1441, 1447 (11th Cir. 1997) (same); *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645, 648 (7th Cir. 1997) (same); *Gasner v. Board of Supervisors of the County of Dinwiddie, Virginia*, 103 F.3d 351, 360 (4th Cir. 1996) (same). And although not expressly relied upon by the Second Circuit, its decision is also consistent with the causation provision contained in the Reform Act. *See* 15 U.S.C. § 78u-4(b)(4) ("In any action arising under this chapter, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages.").

fiduciary duty claims against The Greater's board in the New York State courts.[6](15a-16a)

The Second Circuit's decision does not, as petitioners contend, "threaten to undermine the well-functioning system of corporate suffrage." (Petition at p. 10) On the contrary, the decision below is based upon traditional principles of causation as applied to the highly particularized and unique facts of this case. There is no compelling reason for this Court to grant the petition.

b. Under The Peculiar Facts Alleged, The Question Of Causation Was Appropriately One Of Law For The Court

The Second Circuit properly assumed all facts in the second amended (and "corrected") complaint to be true and gave petitioners the benefit of all reasonable inferences. It was also entitled to rely on the entirety of the Proxy (3a) and did not have to accept petitioners' speculations, deductions or legal conclusions as true. *See, e.g., United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 27 (2d Cir. 1989); 2 JAMES WM. MOORE ET AL., MOORE'S

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6. Petitioners' assertion that "a state remedy was allegedly lost as well" (Petition at p. 16 & n.8) is disingenuous at best. They coyly state that they claimed in the proceedings below that "the misleading proxy solicitation led *absent* class members to forego their right to seek an appraisal. . . ." (Petition at p. 16 & n.8 (emphasis added).) Assuming that a loss of state appraisal rights could provide a basis for causation — a question left open in *Virginia Bankshares*, *see* 501 U.S. at 1107, there is no allegation *in the complaint* that petitioners or any other class members forewent their appraisal rights as the result of a misleading proxy. (15a) Therefore, even if true, this question is not properly before this Court.

FEDERAL PRACTICE § 12.34 [1][b] (3d ed. 2000). Where, as here, the facts are undisputed and are susceptible of only one reasonable inference, the question of causation is one of law for the Court and should not be submitted to a jury. *See Grace*, 228 F.3d at 49-50 (affirming district court's dismissal of false and misleading proxy claims because plaintiffs failed as a matter of law to prove causation); *Robbins v. Koger Properties, Inc.*, 116 F.3d 1441, 1449 (11th Cir. 1997) (reversing district court and stating that "[b]ecause plaintiffs failed to support an essential element of their 10b-5 claim, loss causation, the district court erred in denying [defendant's] motion for judgment as a matter of law."); *see generally* 57A AM. JUR.2D *Negligence* § 446 (1989).

Based on the facts alleged in the second amended (and "corrected") complaint, it was perfectly proper for the Second Circuit to conclude that even if a reasonable shareholder knew of the omitted facts regarding North Fork, he would have been no less likely to approve the Astoria merger. (*See* 11a-13a) The inference petitioners asked the Second Circuit to accept — that a reasonable shareholder would "believe . . . that there was a substantial likelihood of a near-term and more favorable merger with North Fork after rejection of the Astoria merger" (11a) — is, as the court below found, unreasonable and based purely on speculation. (*See* 11a-13a)

Now, petitioners ask this Court to accept as true their wild speculation that, if further disclosure had been made, North Fork might have launched a hostile tender offer or waged a lengthy proxy contest to replace The Greater's board with directors who would look more favorably upon North Fork's acquisitive overtures. (Petition at p. 18) North Fork, however, was itself a Greater shareholder and recipient of the

Proxy. It was fully aware of the information petitioners claim should have been disclosed and, nonetheless, voted in favor of the Astoria merger. North Fork's knowing conduct belies petitioners' unfounded prediction. Rhetorical flourishes in an advocate's petition, such as those presented here, are no substitute for well-pleaded allegations of fact in a complaint, and no court is required to accept them as true. *See First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir. 1994), *cert. denied*, 513 U.S. 1079 (1995) ("Under Rule 12(b)(6), 'the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted.' "). Under these circumstances, there was nothing for a jury to decide, and dismissal of the case was appropriate. *See generally Grace*, 228 F.3d at 46 ("In framing the contours of private rights of action implied under the [Exchange] Act, the courts have sought to exclude, as a matter of law, claims based on hypothetical circumstances or speculation.").[7]

c. Dismissal Of The Second Amended (And "Corrected") Complaint Is Also In Accord With The Rationale in *Basic*

In *TSC Industries, Inc. v. Northway, Inc.*, this Court stated that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it

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7. Petitioners' remaining arguments concerning the dismissal of their claims of a misleading fairness opinion are wholly without merit. (*See* Petition at pp. 21-22.) The Second Circuit correctly noted that while a statement that a merger is fair could be actionable, petitioners did not allege "provable" facts to support their claim. (14a-15a); *cf. Virginia Bankshares*, 501 U.S. at 1093. Its decision is correct and does not present any issue warranting this Court's review or meriting further discussion here.

important in deciding how to vote," 426 U.S. 438, 449 (1976), and, in other words, that " 'the defect have a significant propensity to affect the voting process.' " *Id.* (quoting *Mills*, 396 U.S. at 384).

Subsequently, in *Basic*, this Court held that the materiality of merger proposals depends " 'upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.' " *Id.* at 238 (quoting *SEC v. Texas Gulf Sulphur*, 401 F.2d 833, 849 (2d Cir. 1968) (en banc)). This Court stated: "[I]n order to assess the probability that the event will occur, a factfinder will need to look to indicia of interest in the transaction at the highest corporate levels." *Id.* at 239.

Here, the allegedly omitted fact was the mere speculative possibility that North Fork's offer *might* (as opposed to definitely would) increase after due diligence. As the District Court found, the nondisclosure of this theoretical possibility could not be material because petitioners' allegations make clear that The Greater was not interested in merging with North Fork under any circumstances. (37a-38a) Accepting petitioners' allegations as true, as the Court must on a motion to dismiss, demonstrates that the probability of The Greater merging with North Fork was zero. Hence, *Basic* mandates that, as a matter of law, the alleged omission regarding North Fork was immaterial.[8]

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8. The District Court's conclusion in this regard is consistent with the conclusions reached by several other courts. *See Panfil v. ACC Corp.*, 768 F. Supp. 54, 58-59 (W.D.N.Y.) (granting motion to dismiss because there was no probability of merger transaction), *aff'd*, 952 F.2d 394 (2d Cir. 1991); *Taylor v. First Union Corporation of* (Cont'd)

This Court's analysis in *Basic* is another compelling reason why the petition should be denied.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: January 26, 2000

(Cont'd)
South Carolina, 857 F.2d 240, 244-45 (4th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989) (reversing jury verdict and directing judgment in favor of defendants because merger discussions were contingent and speculative); *cf. Berman v. Gerber Products Co.*, 454 F. Supp. 1310, 1317-18 (W.D. Mich. 1978) (cited approvingly in *Basic*, 485 U.S. at 240 & n.19) (granting summary judgment and dismissing complaint alleging misleading statements under section 14(e) of Exchange Act; "Because such [acquisition] overtures were not firm offers they should not be deemed material information required to be disclosed under Section 14(e).").